which the public is served — the state; and an end is rapidly being made of that noxious dogma.[14] It is the merest justice that if the public seeks benefit, if men search to benefit the public, due care should be taken not to harm those interests met in the process which are not directly public also. A charity's personality will suffer no less detriment if it is allowed to be irresponsible than a private enterprise. A hospital, for instance, ought to be forced to take as much care in the selection of its nurses as a banker in the selection of his cashiers. We have found that the enforcement of liability is the only adequate means to this latter end, and it is difficult to see why the same is not true in every other sphere. French law has not hesitated to hold a county asylum liable for the arson of an escaped lunatic; and we may be sure that the prefect of the department concerned will take due care that the superintendent of his asylum is not a second time guilty of negligence.[15] The whole problem is an illustration of the vital need of insisting as much on the processes of institutions as on their purposes. A negligently administered charity may aim at inducting us all into the Kingdom of Heaven, but it is socially essential to make it adequately careful of the methods employed. It is only by the recognition of the personality involved in the trust, and of its consequences, that this end may be satisfactorily achieved.

BOYCOTTS ON MATERIALS.[1] — When one man by the free exercise of his faculties prevents a similar exercise by another, a justiciable question arises. The law meets it by weighing the social value of the two ends in view and allowing to prevail the action directed toward the more socially valuable.[2] Where the ends are of equal social value, the loss must lie where it falls. Hence trade competition will justify an intentional injury, where individual interests alone are balanced, there being no injury to society.[3] But spite, malice, injury for its own sake are not ends which the law can recognize.[4] The history of labor litigation is the history of a broadening conception of this principle.

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[14] *Cf.* Barker, "The Rule of Law," POLITICAL QUARTERLY, May, 1914, and DUGUIT, LES TRANSFORMATIONS DU DROIT PUBLIC, chap. 8.

[15] 3 SIREY, 1908, 98, with note by M. Hauriou.

[1] "The salient characteristic of the boycott on materials is its appeal to organized labor. Its essence is organized disapproval of certain impliments and materials with which men work." WOLMAN, THE BOYCOTT IN AMERICAN TRADE UNIONS, 43. In this class of boycott the disapproval is by those who work with the materials, and not by those who consume them.

[2] See "Interests of Personality," Roscoe Pound, 28 HARV. L. REV. 343, 445. Examples of the application of this principle of the balancing of interests are: The rules of liability for animals; the rule of liability without fault; the so-called Fletcher *v.* Rylands doctrine; the rules of privileged communications in libel and slander. See also Keeble *v.* Hickeringill, 11 East, 574, where defendant is liable for maliciously frightening ducks from the plaintiff's decoys. See also 31 HARV. L. REV. 193, for the principle applied to contracts to refrain from doing business.

[3] Blake *v.* Lanyou, 6 T. R. 221; Adams *v.* Bafeald, 1 Leon. 240; Mogul Steamship Co. *v.* McGregor, Gow & Co. (1892), A. C. 25.

[4] "How far an Act may be a Tort because of the Wrongful Motive of the Actor," James Barr Ames, 18 HARV. L. REV. 411. See Mills *v.* U. S. Printing Co., 99 N. Y. App. Div. 605, 613.

The individualism of the nineteenth century had affected the method of approach to labor disputes before they became problems for the courts. Adult male workers were considered independent retailers of the same commodity in competition with one another.[5] Furthermore, the first cases in which the courts discerned more than the property right of the master in his servant [6] tended to conceal the true economic interests involved. They were largely suits between workers.[7] It is not strange, then, that at first the courts required advancement of the individual interest of the worker as justification for a strike.[8] This conception of justification, strengthened, perhaps, by the hesitancy of the unions to incorporate, proved inadequate when extensive attempts at unionization began. To some courts there seemed to be a valid distinction between strikes for the discharge of fellow workers, where the motive was to get more work for oneself and where it was to replace them with members of one's union.[9] Other jurisdictions, however, recognized the interest of all union men of a shop in unionization as a lawful end for acting and weighed it equally with the self-interest of the person whom that action injured.[10] The growth of organizations with which to further this new aim soon raised a new problem. A union gave notice to an employer that it would call out his employees, unless he ceased dealing with another employer, against whom members of the same union were striking for unionization. This outraged an individualistic sense of justice. The first employer was considered a neutral. To protect him the courts reasoned that the interest of his employees in the struggle was secondary, and so was outweighed by his direct self-interest.[11]

[5] This is well shown in English labor legislation. The first acts were called forth by epidemics among the pauper apprentices who were farmed out by the Poor Laws under shocking circumstances. They deal with the health and hours of labor of the children. 42 GEO. III, c. 73; 59 GEO. III, c. 66; 60 GEO. III; 1 GEO. IV, c. 5; 6 GEO. IV, c. 63; 10 GEO. IV, c. 51; 10 GEO. IV, c. 63; 1 & 2 WILL. IV, c. 39; 3 & 4 WILL. IV, c. 103. The same protection was extended to adult women in 1844. 7 & 8 VICT. c. 15. This act required the fencing of machinery, but it required another interpretative act to make it clear that the most dangerous machinery must be fenced in parts of the factory where only men were employed. 19 & 20 VICT. c. 38. Men employed in factories which did not employ women or children were not the subject of consideration until 1878. 41 VICT. c. 16; 46 & 47 VICT. c. 53; 52 & 53 VICT. c. 62; 54 & 55 VICT. c. 75. These acts prohibited only certain conditions dangerous to health. The adult was still thought a free agent to work as he chose. For a more recent application of this idea, see Lockner *v.* New York, 198 U. S. 45.

[6] For this early type of case see Walsby *v.* Auley (1861), 30 L. J. (M. C.) 121. See persistence of this theory. Brennan *v.* United Hatters, 73 N. J. L. 728, 743.

[7] Allen *v.* Flood (1898), A. C. 1; Walker *v.* Cronin, 107 Mass. 555; Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011; Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753; Curran *v.* Galen, 102 N. Y. 33.

[8] Cases under note 7, *supra.* Berry *v.* Donovan, 188 Mass. 353, 78 N. E. 753.

[9] Pickett *v.* Walsh, 192 Mass. 572, 584, *supra;* Lucke *v.* Clothing Cutters & Trimmers Assembly, 77 Md. 396, 26 Atl. 505; Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327. In Plant *v.* Woods, *supra,* "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition."

[10] National Protective Society *v.* Cummings, 170 N. Y. 315, 63 N. E. 369; Kemp *v.* Division No. 241, 255 Ill. 213, 99 N. E. 389; National Fireproofing Co. *v.* Mason Builders Ass'n, 169 Fed. 259; Roddy *v.* United Mine Workers, 41 Okla. 621, 139 Pac. 126; Plant *v.* Woods, *supra.*

[11] Pickett *v.* Walsh, *supra;* Purvis *v.* United Brotherhood of Carpenters and Joiners,

But this is not a true statement of the principle of law upon which these decisions rest. When a man interferes with the liberty of action of society, as well as of individuals, the social value of his end in view must justify also the social inconvenience of his means of attaining it.[12] The law is obviously lost when it attempts to value as primary or secondary an interest for which a man will sacrifice money and employment. The man himself must be the only judge of that. But the law can weigh the social value of a stronger union with the social loss involved in a widened struggle.

A recent decision of the New York Court of Appeals illustrates the common confusion of these two principles and the attempt to lay down a rule of law which shall at once mark the limits of both. *Bossert* v. *Dhuy*.[13] The court holds that a strike, or threatened strike, by reason of the refusal of union men to work upon materials, in the manufacture of which there has been "unfairness" [14] to their union, is lawful, because the men have a "primary interest" in the subject matter of the dispute, *i. e.*, securing work for union men upon the materials in the earlier stages of production. In recognizing the union as a whole, as a unit in which the men had a vital interest, instead of merely the shop, the court was not, as it thought, laying down a rule of law, but admitting an established fact. The effect of the decision, however, is to lay down a most important rule of law based upon the second principle outlined above. The social loss entailed by this means of advancing the union is now considered outweighed by the social value of the end.

There appears to be no reason why the principle of this decision should not legalize the boycott on materials of labor in all its forms. If legal, when the materials are bought from an "unfair" firm, it should be equally so, when they are to be sold to an "unfair" firm. The interests involved are all the same; likewise in the so-called collateral boycott on materials. When an employer takes work to tide over another employer whose union men are striking, the legality of a strike by the former's employees should depend upon the legality of that of the latter's. It may be suggested here that the unconscious tendency of the courts is toward the view, that the social loss resulting from the widened struggle is justified in those cases where, figuratively speaking, the employer

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214 Pa. St. 348, 63 Atl. 585; Booth *v.* Burgess, 72 N. J. Eq. 181, 65 Atl. 226; *cf.* Atkins *v.* W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074; Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841; Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663. But *cf.* Boyer *v.* Western Union Tel. Co., 124 Fed. 246.

[12] For example, trade competition will not justify inducing a breach of contract. (Lumley *v.* Guy, 2 E. & B. 216; Hitchman Coal & Coke Co. *v.* Mitchell, U. S. Sup. Ct., decided December 10, 1917, nor intimidation, Tarleton *v.* M'Gawley (1794), Peake, N. P. C. 270. Keeping out trespassers will not justify spring guns. Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1; State *v.* Moore, 31 Conn. 479, 83 Am. Dec. 159. But *cf.* Glott *v.* Wilkes, 3 B. & Ald. 304, to see that it is always a matter of the opinion of the times as to values.

[13] See page 493, *infra*.

[14] "The words 'fair' and 'unfair' are frequently used. . . . The difference between them is the classic distinction between orthodoxy and heterodoxy. 'Fair' means what is pleasing to the parties using the word, and 'unfair' means whatever they do not like." Hough, J., in Gill Engraving Co. *v.* Doerr, 214 Fed. 111, 114, note. Unfairness is used in this note to mean anything which would give the unfair person's union employees the right to strike.

has committed a breach of neutrality.[15] An employer is guilty of a hostile act against a union when he has dealings with materials as the subject matter of labor in the immediate past, future, or in the present manufacture of which there has been "unfairness" to the union. A recent Connecticut case suggests a variation of this formula. *Cohn & Roth Electric Co.* v. *Bricklayers, Masons & Plasterers Local Union No. 1.*[16] Upon the facts of this case it might be maintained that an employer commits a hostile act against a union when he employs a subcontractor who is "unfair" to the union in any of his work. It will be seen that the purely sympathetic strike is at the very end of this road.

As in any branch of the law the historical development of the litigation largely explains the method of treatment. The social interest crept into the struggle while the courts were searching for a criterion with which to measure the conflicting interests of individuals. Vaguely feeling this, the courts tried to recognize it in language adapted to the individual interest. Now that the social significance has become the dominating factor, this language is seriously misleading. Any attempt to suggest the future of this field of the law must clearly distinguish the application of these two principles.[17] As to what purpose of labor the law will recognize in balancing its interest with that of the employer, the fact of the interest of all workingmen in their betterment as a class will inevitably be admitted. This would mean that a strike would be lawful whenever an employer was "unfair" to any labor, or whenever he was connected by his product or by employment with any other employer who was similarly "unfair."[18] In considering what further social damage from the development of the strike and boycott will be considered justified by the end, other factors are involved. It is not merely a question of the value placed upon a highly organized working class with the attendant betterment of conditions, but the law must be convinced that the employment of such drastic means is justified by the absence of any reasonable substitute. At this point we emerge into the open country of economic and political speculation.[19] In such a country the law has never been a pioneer.

PROCEEDINGS *IN FORMA PAUPERIS*. — The California Political Code[1] makes the common law of England, so far as not inconsistent with the

[15] Master Builders Ass'n *v.* Damascio, 16 Colo. App. 25, 63 Pac. 782; Parkinson *v.* Building Trades Council, 154 Cal. 581, 98 Pac. 1027; Gill Engraving Co. *v.* Doerr, 214 Fed. 111; State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177. See also cases cited in note 10.

[16] See page 494, *infra*.

[17] For a clear conception of the difference, see opinion of Shaw, C. J., in Commonwealth *v.* Hunt, 4 Met. (Mass.) 111.

[18] "Workingmen cannot be compelled to work when by doing so their position as workingmen will be injured simply because if they do not continue their work the manufacturing employer will not be able to sell as large a quantity of material as he otherwise would and thus his good will, trade or business may be affected." Bossert *v.* Dhuy, *supra*.

[19] "The doctrine of the just cause or excuse inevitably operated so as to leave to judges and juries the decision of questions not so much of law and fact as of ethics and economics." GELDART, THE PRESENT LAW OF TRADE DISPUTES AND TRADE UNIONS, 24.

[1] § 4469.